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2
3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA

5 * * *

6 Charmane Smith,

7 Plaintiff,

8 v.

9 BulkSupplements.com, and Kevin
Baronowsky,

10 Defendants.

Case No. 2:22-cv-00600-APG-DJA

11
12 **Order**

13 Under 28 U.S.C. § 1915 Plaintiff is proceeding in this action *pro se* and has requested
14 authority to proceed *in forma pauperis*. (ECF No. 6). Plaintiff also submitted a complaint with
15 her initial application, which application was denied without prejudice. (ECF No. 1-1); (ECF No.
5).

16 **I. In Forma Pauperis Application**

17 Plaintiff filed the affidavit required by § 1915(a). (ECF No. 8). Plaintiff has shown an
18 inability to prepay fees and costs or give security for them. Accordingly, the request to proceed
19 *in forma pauperis* will be granted under 28 U.S.C. § 1915(a). The Court will now review
20 Plaintiff's complaint.

21 **II. Screening the Complaint**

22 Upon granting an application to proceed *in forma pauperis*, courts additionally screen the
23 complaint under § 1915(e). Federal courts are given the authority to dismiss a case if the action is
24 legally "frivolous or malicious," fails to state a claim upon which relief may be granted, or seeks
25 monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2).
26 When a court dismisses a complaint under § 1915, the plaintiff should be given leave to amend
27 the complaint with directions as to curing its deficiencies, unless it is clear from the face of the
28

1 complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70
2 F.3d 1103, 1106 (9th Cir. 1995).

3 Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a
4 complaint for failure to state a claim upon which relief can be granted. Review under Rule
5 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d
6 719, 723 (9th Cir. 2000). A properly pled complaint must provide a short and plain statement of
7 the claim showing that the pleader is entitled to relief. Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp. v.*
8 *Twombly*, 550 U.S. 544, 555 (2007). Although Rule 8 does not require detailed factual
9 allegations, it demands “more than labels and conclusions” or a “formulaic recitation of the
10 elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Papasan v.*
11 *Allain*, 478 U.S. 265, 286 (1986)). The court must accept as true all well-pled factual allegations
12 contained in the complaint, but the same requirement does not apply to legal conclusions. *Iqbal*,
13 556 U.S. at 679. Mere recitals of the elements of a cause of action, supported only by conclusory
14 allegations, do not suffice. *Id.* at 678. Secondly, where the claims in the complaint have not
15 crossed the line from conceivable to plausible, the complaint should be dismissed. *Twombly*, 550
16 U.S. at 570. Allegations of a *pro se* complaint are held to less stringent standards than formal
17 pleadings drafted by lawyers. *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (finding
18 that liberal construction of *pro se* pleadings is required after *Twombly* and *Iqbal*).

19 ***A. The Court dismisses Plaintiff’s complaint without prejudice.***

20 Plaintiff alleges that she attempted to order supplements from Defendant
21 Bulksupplements.com—the CEO of which is Defendant Kevin Baronowsky—but that her orders
22 were not fulfilled. She alleges that Bulksupplements.com called her and explained that it could
23 not accept orders through the mail and that it had shredded her letters. Plaintiff adds that she
24 received two letters from Bulksupplements.com’s customer service explaining that items were out
25 of stock and reiterating that Bulksupplements.com does not accept orders sent by the mail.
26 Plaintiff then lists Section 5 of the Federal Trade Commission Act, the Payment Card Industry
27 Data Security Standards, the Tennessee Consumer Protection Act, and the Nevada Consumer
28 Protection Act as the statutes under which her claims arise.

1 However, Section 5 of the Federal Trade Commission Act does not create a private right
2 of action. *See Kimbrell v. Twitter Inc.*, No. 18-cv-04144-PJH, 2018 WL 6025609, at *4 (N.D.
3 Cal. Nov. 16, 2018). And while Plaintiff asserts that Defendants did not follow the Payment Card
4 Industry Data Security Standards because they did not provide adequate protections for data,
5 Plaintiff has not asserted, and this Court has not found, authority which establishes a private right
6 of action under these standards. Even if she did provide this authority, Plaintiff has not alleged
7 facts showing *how* Defendants have failed to follow these standards. And while Plaintiff broadly
8 invokes the Tennessee Consumer Protection Act and Nevada Consumer Protection Act, she does
9 not explain the portion of these acts under which her claims arise or what Defendants did to
10 violate them.

11
12 **IT IS THEREFORE ORDERED** that Plaintiff's application to proceed *in forma*
13 *pauperis* (ECF No. 6) is **granted**. Plaintiff shall not be required to pre-pay the filing fee.
14 Plaintiff is permitted to maintain this action to conclusion without the necessity of prepayment of
15 any additional fees or costs or the giving of a security therefor. This order granting leave to
16 proceed *in forma pauperis* shall not extend to the issuance and/or service of subpoenas at
17 government expense.

18 **IT IS FURTHER ORDERED** that the Clerk of Court is kindly directed to file Plaintiff's
19 complaint (ECF No. 1-1) on the docket but shall not issue summons.

20 **IT IS FURTHER ORDERED** that the complaint (ECF No. 1-1) is **dismissed without**
21 **prejudice** for failure to state a claim upon which relief can be granted, with leave to amend.
22 Plaintiff will have until **August 17, 2022** to file an amended complaint if the noted deficiencies
23 can be corrected. If Plaintiff chooses to amend the complaint, Plaintiff is informed that the Court
24 cannot refer to a prior pleading (i.e., the original complaint) to make the amended complaint
25 complete. This is because, generally, an amended complaint supersedes the original complaint.
26 Local Rule 15-1(a) requires that an amended complaint be complete without reference to any
27 prior pleading. Once a plaintiff files an amended complaint, the original complaint no longer
28 serves any function in the case. Therefore, in an amended complaint, as in an original complaint,

1 each claim and the involvement of each Defendant must be sufficiently alleged. **Failure to**
2 **comply with this order will result in the recommended dismissal of this case.**

3
4 DATED: July 18, 2022



DANIEL J. ALBREGTS
UNITED STATES MAGISTRATE JUDGE